(2)

No. 91-812

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

PACIFIC BELL, PACIFIC TELESIS GROUP,
PACIFIC TELEPHONE & TELEGRAPH COMPANY,
PACIFIC TELESIS GROUP PENSION PLAN FOR
SALARIED EMPLOYEES,

Petitioners,

v.

LANA PALLAS (aka LANA HUBBS),
and persons similarly situated,

Respondents.

**On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit**

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Does an employee state a valid claim of pregnancy discrimination under Title VII, as amended prior to 1991, by alleging that her employer denied her pension benefits in 1987 under a service crediting system which excluded all pregnancy leaves taken prior to 1979 but included all other temporary disability leaves taken during the same time period?

2. Does a pension plan participant state a valid claim for breach of fiduciary duty under ERISA by alleging that the pension plan sponsor wrongfully excluded part of her 1972 pregnancy disability leave in calculating her eligibility for pension benefits?

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RESPONDENTS' BRIEF IN OPPOSITION

STATUTES INVOLVED

This case involves Section 701(k) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e(k), which provides, in pertinent part:

> The terms "because of sex" or "on the basis of sex" include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt

of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work, and nothing in section 2000e-2(h) of this title shall be interpreted to permit otherwise.
* * *

This case also involves Sections 404 and 502 of the Employee Retirement Income Security Act of 1974, 29 U.S.C. §§ 1104(a)(1), 1132(a)(1), (3), which are set out in the Appendix. App. at 1a-2a. Relevant to the issue of granting certiorari is Section 112 of the Civil Rights Act of 1991, 102 Pub.L. No. 166, § 112 (1991), which is set out in the Appendix. App. at 3a.

STATEMENT OF THE CASE

A. Nature of the Case

Pacific Bell[1] came into existence as a new business entity and employer in 1984, as a result of the court-ordered breakup of American Telephone and Telegraph Company. As a newly established company, Pacific Bell created various and numerous personnel policies, including policies for calculating employees' service credit. It also established new pension plans with corresponding eligibility criteria.[2]

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[1] Petitioners Pacific Bell, Pacific Telesis Group, and Pacific Telephone & Telegraph Company are employers and petitioner Pacific Telesis Group Pension Plan for Salaried Employees is an employee pension benefit plan. For ease of reference, petitioners are referred to collectively as "PacBell" herein. Petitioner Pacific Bell, which came into existence in 1984, is a subsidiary of petitioner Pacific Telesis Group; the term "Pacific Bell" is used throughout this brief to refer to those two petitioners.

[2] In analyzing the effect of the divestiture on existing pension plans, the court found that divestiture required the establishment of new pension plans by the divested regional companies. It noted that the decree did not set out rules for how the new post-divestiture pension plans should determine when an employees' pension rights become vested. *United States v. Western Electric Co.*, 569 F. Supp. 1057, 1094 n. 160 (D.D.C. 1983).

This lawsuit challenges PacBell's decision to deny Lana Pallas pension benefits under an Early Retirement Opportunity offered to management employees in 1987. It is undisputed in this lawsuit that Pallas was denied this new benefit because under PacBell's service crediting policies, employes disabled by pregnancy prior to 1979 do not receive service credit towards their pension eligibility for their pregnancy-related leaves. It is also undisputed that PacBell does credit towards pension eligibility all other temporary disability leaves for the same pre-1979 period. It is this facially discriminatory treatment of pregnancy by PacBell which the court of appeals concluded violated Title VII, as amended by the Pregnancy Discrimination Act of 1978, California's Fair Employment and Housing Act, and the Employee Retirement Income Security Act.[3]

Pallas has worked for petitioner Pacific Bell and its predecessor companies, Pacific Telephone and Telegraph Co. ("Pacific Telephone") and American Telephone and Telegraph Co. ("AT&T"), since 1967. In 1972, Pallas became pregnant and was forced by her then employer, Pacific Telephone, to take a personal leave of absence during her period of disability, rather than a disability leave. Pallas' personnel records, including doctors' notes, clearly indicate that her absence was due to medical reasons. Pacific Telephone's "Net Credited Service" policies granted employees service credit for disability leaves, but did not grant service credit for personal leaves.

In 1987, Pacific Bell, Pallas' new employer, announced a new, one-time only, benefit for managerial, non-union employees, called an Early Retirement Opportunity

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[3] Title VII was most recently amended in 1991. This lawsuit was filed and the decisions below were issued before the 1991 amendment was enacted. Upon remand to the district court it is unclear whether the trial court will apply the Civil Rights Act of 1991 to this case.

("ERO"). Under the terms of this new pension plan, a managerial employee would be eligible for an early retirement benefit if her "unadjusted term of employment is 20 years or more on or before December 31, 1987 . . . ." By notice to its managerial employees, Pacific Bell explained that such employees would be eligible for this new benefit if their "actual term of employment, or Net Credited Service (NCS), will be 20 years or more on or before your retirement date (December 31, 1987 or prior)."

In 1987, Pallas applied for retirement under the ERO, but PacBell determined that she was ineligible because she did not have the requisite 20 years of service. PacBell did not base its determination on Pallas' "unadjusted" or "actual" term of employment. Instead, PacBell based her ineligibility upon their calculation of her net credited service. In that calculation, PacBell refused to credit Pallas' 1972 pregnancy disability leave toward the ERO. PacBell, however, gave service credit towards ERO eligibility for all other pre-1979 absences due to temporary medical disabilities. It is PacBell's policy to exclude from the net credited service calculation all pre-Pregnancy Discrimination Act pregnancy disability leaves.

After the initial determination that she was ineligible for the ERO, Pallas followed Pacific Bell's internal review procedures and obtained a re-calculation of her service credit for purposes of ERO eligibility. Pacific Bell's Employees' Benefits Claims Review Committee reviewed Pallas' records and adjusted her Net Credited Service date to give her service credit for some, but not all, of her pregnancy disability leave. By letter dated October 11, 1988, Pacific Bell informed Pallas that it had made a final determination that she was ineligible for the 20-year plan retirement option, by three to four days of service credit. On or about December 16, 1988, Pallas filed a charge of discrimination with the United States Equal Employment Opportunity Commission.

B. Proceedings Below

Pallas filed a class action complaint, alleging that PacBell's net credit service system used to calculate eligibility for the ERO and other benefits is facially discriminatory because it does not credit pregnancy leaves taken prior to 1979 but credits all other temporary disability leaves taken during the same period. The complaint was brought under Title VII, as amended prior to 1991, and California's FEHA. Additionally, Pallas alleges that PacBell's interpretation and application of the ERO violates ERISA.

PacBell moved for dismissal of the entire complaint, for failure to state a claim. The district court ruled that Pallas had not stated a valid claim for discrimination under Title VII or the FEHA and dismissed both claims with prejudice. The district court dismissed the ERISA claim, although it granted Pallas leave to amend to allege facts supporting a claim for improper administration of benefits under ERISA. Pallas filed an Application For Entry of Judgment declining the court's leave to amend on the grounds that her complaint as framed properly alleged a claim for relief under ERISA and timely appealed the judgment entered by the district court.

The Ninth Circuit Court of Appeals unanimously reversed the district court as to its dismissal of Pallas' ERISA cause of action.[4] The panel split on the Title VII issue, with Circuit Judges Mary M. Schroeder and Jerome Farris voting to reverse the district court's dismissal of the Title VII claim and District Judge Edward Dumbauld voting to affirm. The court of appeals remanded this case to the district court, where, prior to the motion for dismissal, only limited discovery had begun. PacBell's request for a rehearing and suggestion for a rehearing en banc were denied. After the Ninth Circuit issued its

[4] Petitioners inaccurately state that "[a] divided panel of the Ninth Circuit reversed." Petition at 6.

decision, Title VII was amended by enactment of the Civil Rights Act of 1991.

REASONS FOR DENYING THE WRIT

This Court should not exercise its discretion to grant the petition filed in this case. PacBell's claim that the decision of the Court of Appeals for the Ninth Circuit will have unprecedented and far-reaching consequences beyond the facts and parties to this case is not supported by the decision itself, the facts of this case, or the current state of Title VII law.

The facts of this case, involving a pension benefit which PacBell offered to its managerial employees in 1987, do not present a challenge to a "competitive status" seniority system and the Ninth Circuit's decision in this case will not affect employers' ability to use existing competitive seniority systems to determine such matters as promotions, transfers, and shift assignments. The decision does not prevent PacBell from using a service crediting system nor require it to eliminate any and all possible discriminatory effects of such a system. Moreover, this case does not challenge a pension plan arrived at through the collective bargaining process; thus any remedy for the Title VII violation will not affect the contractual expectations of workers against whom discrimination did not occur. Compliance with the court of appeals' decision will simply mean that PacBell has to grant service credit, for purposes of benefits, to employees for absences from work due to pregnancy disability which occurred prior to 1979.

In deciding future Title VII cases involving discriminatory seniority or crediting systems, courts and employers will look not to the court of appeals' decision in this case, but to Section 112 of the Civil Rights Act of 1991, which specifically amends Title VII to expand the right to challenge discriminatory seniority systems. At the time of

the lower courts' decisions in this case, the Civil Rights Act of 1991 had not been enacted and therefore its application to this case was not analyzed by the lower courts.

The court of appeals' decision here comports with this Court's long line of decisions holding that Section 703(h) of the Civil Rights Act of 1964 does not apply to facially discriminatory crediting or seniority systems. Contrary to PacBell's assertion, the court of appeals did not overlook the importance and significance of Section 703(h) in its decision. Neither did it engage in a "novel and restrictive" interpretation of Section 703(h) which warrants review by this Court. Rather, the court of appeals found that Section 703(h) of Title VII did not apply to PacBell's net credited service system because the crediting system was not a neutral system being challenged because of its discriminatory effects, but rather the system itself was facially discriminatory. It is that finding of facial discrimination that precludes the application of Section 703(h) to this case, not a misreading of the Title VII's seniority provision. As this Court decided in *Bazemore v. Friday*, 478 U.S. 385 (1986), an employment policy which currently treats similarly situated persons in a protected class differently violates Title VII, even if the treatment is the continuation of a policy that was instituted by the employer at a time when it was legal. There is no split among the Circuits on the issue of the applicability of *Bazemore* to facially discriminatory employment policies of this nature.

For Pallas' ERISA cause of action, PacBell's interpretation and application of the pension plan with regard to Pallas' retirement application must be reviewed under ERISA's fiduciary standards, pursuant to this Court's decision in *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101 (1989). The Ninth Circuit Court of Appeals correctly recognized that Pallas challenged the employer's

interpretation and application of the pension plan, not the employer's decision to adopt it. The court of appeals decision below comports with *Firestone*, and does not tread upon any other circuit court decision sanctioning an employer's decision to create, amend or terminate a benefit plan.

I. FUTURE TITLE VII CASES INVOLVING SENIORITY SYSTEMS WILL BE BASED ON INTERPRETATION OF THE RECENTLY ENACTED CIVIL RIGHTS ACT OF 1991, NOT INTERPRETATION OF THE PRE-ACT COURT OF APPEALS DECISION IN THIS CASE.

Before discussing the arguments raised on the merits by petitioners, Pallas first takes issue with PacBell's statement that grant of certiorari to review the decision of the Ninth Circuit is important in this case because the "decision is of immense practical and legal importance not only for petitioners, but for all employers." Petition at 9. In fact, the reality is that whatever the import of the appellate court's decision to the parties to this litigation, Congress' recent amendment of Title VII through the Civil Rights Act of 1991 ("the 1991 Act") has significantly reduced, if not eliminated, the importance of the Ninth Circuit's decision for future Title VII seniority cases.

Two issues lie at the heart of this case and were central to the Ninth Circuit's analysis: (1) whether PacBell's seniority or service crediting system is "facially neutral" and (2) what constitutes a timely challenge to a seniority or service crediting system which from its inception overtly discriminates against pregnancy. Both of these questions are addressed by the 1991 Act which will be the basis for future Title VII cases which challenge long-standing discriminatory seniority systems. The issue of facial versus nonfacial discrimination is rendered moot

by the 1991 Act which makes all intentionally discriminatory seniority systems subject to challenge at any time, whether or not the discriminatory purpose is apparent on the face of the seniority provision.[5] 102 Pub. L. No. 166, § 112 (1991). The court below had to reach the issue of facial discrimination because this Court has held that facially neutral seniority systems cannot be challenged under Title VII even if they were adopted with a discriminatory purpose. *See Lorance v. AT&T Technologies, Inc.*, 490 U.S. 900 (1989).

Similarly, the second issue, *i.e.*, what constitutes a timely challenge to an intentionally discriminatory seniority system, though once a burning issue, is now well-settled by the 1991 Act. Now, one aggrieved by such a system may challenge it at the time the system is adopted, at the time the individual becomes subject to the system, or when the person aggrieved is injured by the application of the system. 102 Pub. L. No. 166, § 112.

The litigation below was addressed to Title VII as it existed prior to the recent Congressional amendments. The impact of the Ninth Circuit's decision is, consequently, limited to the interpretation of a statute which no longer exists in its prior form. As such, it is of only "isolated significance." *See, e.g., Rice v. Sioux City Memorial Park Cemetery, Inc.*, 349 U.S. 70, 76 (1955). Contrary to the scenario outlined by PacBell,[6] future

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[5] Appellants misstate the facts when they say that "there is no claim that Pacific Bell's long-standing seniority system was 'adopted for an intentionally discriminatory purpose.'" Petition at n. 5. It is precisely Pallas' claim that the crediting system at issue in this case not only treats pregnant women differently than similarly situated men, but that these practices and policies "were intentionally designed to discriminate against pregnant women." First Amended Complaint, ¶ 62. The allegations of the complaint are, therefore, squarely within the ambit of the new Act.

[6] Although PacBell claims "the will of Congress will [be] frustrated" if employers are forced to review their seniority systems

litigants will be guided, not by this decision, but by new decisional law which will arise to interpret the 1991 Act.

Given these facts, it is clear that the Court's review of this case would present no benefit beyond the particular parties. This Court's consistent position has been that it will not "grant[] the writ of certiorari except in cases involving principles the settlement of which is of importance to the public, as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the Circuit Courts of Appeals." *Layne & Bowler Corp. v. Western Well Works, Inc.*, 261 U.S. 387, 393 (1923).

Moreover, it is unclear what value Supreme Court review would have even for the litigants in the present case. The Ninth Circuit has ordered this case remanded; on remand, the district court will be able to determine, among other things, the impact of the 1991 Act on the present case. At least one district court decision has already held the 1991 Act to be retroactive to pending cases. *See Mojica v. Gannett Company, Inc.*, No. 90C3827 (N.D. Ill., Nov. 27, 1991) (order granting leave to amend complaint and finding Civil Rights Act of 1991 applicable to plaintiff's claims). Certainly it is not appropriate for the Supreme Court to grant review at this stage in order to determine the question of the retroactivity of the 1991 Act to this case, before the Court of Appeals has ruled

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to determine if they are the product of discriminatory treatment, this is exactly the effect of the 1991 Act. By specifically permitting employees to challenge intentionally discriminatory seniority systems at the time they are applied, Congress clearly intended that employers should bear the burden of eliminating intentional discrimination even when it involves seniority systems. The Ninth Circuit's interpretation of the Civil Rights Act of 1964, as amended by the Pregnancy Discrimination Act of 1978, is, therefore, in accord with clear congressional intent as expressed in the 1991 Act.

on the Act or its complex legislative history. *See, e.g., Wise v. Lipscomb*, 437 U.S. 535, 547 (1978).[7]

Finally, it is important to recognize the procedural posture of this case. The original appeal was from the grant of a motion to dismiss. The effect of the Ninth Circuit's ruling, therefore, is merely to remand the case to the District Court for a trial on the merits. Certainly a myriad of questions remain to be resolved in that forum, not the least of these being the effect of the 1991 Act on this action. Neither the interests of the parties nor principles of importance to the public justify review by this Court at this early phase of the case.

II. THE COURT OF APPEALS CONSIDERED THE LANGUAGE AND INTENT OF SECTION 703(h) AND CORRECTLY DECIDED THAT IT DID NOT APPLY TO A FACIALLY DISCRIMINATORY SERVICE CREDITING SYSTEM THAT TREATED PREGNANCY DISABILITY LEAVES DIFFERENTLY THAN ALL OTHER SIMILARLY SITUATED DISABILITIES FOR PURPOSES OF BENEFITS.

A. PacBell's Service Crediting Policies Are Facially Discriminatory Under Title VII Because They Credit Pregnancy Disability Leaves Differently Than Other Temporary Medical Disability Leaves for Purposes of Receipt of Fringe Benefits.

The court below did not, as PacBell asserts as the basis for its writ, overlook Section 703(h) of Title VII and its protection of neutral seniority systems. The court of appeals specifically held that the district court erred in relying on Section 703(h) because PacBell's crediting policies were facially discriminatory. Petition, App. at 5a. Based on its review of the allegations in Pallas' complaint, the court concluded that this case

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[7] Moreover, even if the 1991 Act is not retroactively applied in this case, PacBell must evaluate its service crediting policies in light of the new Act. PacBell continues to offer new retirement plans which calculate eligibility based on the policies at issue here.

> is not a belated attempt to litigate the discriminatory impact of a pre-Pregnancy Discrimination Act program. Pallas challenges the criteria adopted in 1987 to determine eligibility for the new benefit program. The claim could not have been brought earlier. Second, the net credit system used to calculate eligibility under the Early Retirement Opportunity is not facially neutral.

Petition, App. at 5a-6a.

In enacting the Pregnancy Discrimination Act ("PDA"), which amended Title VII, Congress overturned the holding in *General Electric Co. v. Gilbert*, 429 U.S. 125 (1976). In *Gilbert*, this Court upheld a disability plan which provided medical coverage for non-occupational accidents and sicknesses but excluded coverage for disabilities arising out of pregnancy. This Court reasoned in *Gilbert* that the plan's failure to cover pregnancy did not constitute discrimination against women, because some women employees did receive medical coverage for non-pregnancy disabilities.

The Pregnancy Discrimination Act changed the male-female comparison made in *Gilbert* and established the group with which pregnant workers should be compared to determine whether or not discrimination has occurred. The key to a discrimination analysis under the PDA is to compare the treatment of pregnancy disabilities with the treatment of other temporary medical disabilities. *See* 42 U.S.C. § 2000e(k). In *Newport News Shipbuilding & Dry Dock Co. v. EEOC*, 462 U.S. 669 (1983), this Court interpreted the language of the PDA for the first time and concluded that a benefits plan was facially discriminatory because it treated pregnancy-related conditions less favorably than other medical conditions for purposes of receipt of benefits.

Under the plain language of the PDA and this Court's holding in *Newport News*, PacBell's policy for calculating pension credit is facially discriminatory. PacBell does not

credit towards pension eligibility, in this case for the Early Retirement Opportunity, pre-1979 absences due to pregnancy disability but does credit pre-1979 absences due to all other temporary medical disabilities. PacBell's exclusion of pre-1979 pregnancy disability absences when awarding benefits is precisely the sort of policy which the Pregnancy Discrimination Act set out to correct. The PDA states that women "affected by pregnancy childbirth, or related medical conditions shall be treated the same for . . . *receipt of fringe benefits*[] as other persons not so affected but similar in their ability or inability to work . . . ." 42 U.S.C. § 2000e(k) (emphasis added). In the instant case, all the employees absent due to temporary medical disabilities prior to 1979 were similar in their inability to work, yet PacBell does not treat them the same purposes of receiving pension benefits.

PacBell argues that its pension plans do not discriminate against pregnancy because they are merely based on an employee's years of service and do not specifically mention pregnancy. Put differently, PacBell is arguing that seniority and seniority "dates" are inherently neutral. However, an employer's benefits policies are not automatically neutral simply because they base eligibility on a numerical Net Credited Service date. For purposes of a discrimination analysis, the relevant determination is *how* a number is arrived at, *i.e.*, the criteria for deciding what absences or breaks will be credited towards the Net Credited Service date. *See, e.g., Arizona Governing Committee for Tax Deferred Annuity & Deferred Compensation Plans v. Norris*, 463 U.S. 1073, 1080-82 (1983); *Los Angeles, Dept. of Water and Power v. Manhart*, 435 U.S. 702, 716 (1978) (holding in part that the fact that female employees' contributions towards a pension plan were based on longevity statistics did not make the plan gender neutral). In the instant case, PacBell's criteria is to credit all pre-1979 disability absences except pregnancy when computing an employee's Net Credited Service ("NCS") date.

In a strikingly similar case, *EEOC v. Borden's, Inc.*, 724 F.2d 1390 (9th Cir. 1984), a company's employees could not receive severance pay if they were eligible for retirement. Borden defended itself against claims of age discrimination by arguing that its severance pay policy was neutral because it distinguished among employees on the basis of retirement status, not age. The court of appeals looked behind the "neutral" retirement status and found that Borden's policy actually discriminated on the basis of age. As in this Court's decision in *Johnson Controls*, the Ninth Circuit went on to hold that facially discriminatory practices constitute intentional discrimination regardless of the subjective motivation behind their establishment. 724 F.2d at 1393. *See also International Union, et al. v. Johnson Controls*, —— U.S. ——, 111 S. Ct. 1196, 1203-04 (1991).

PacBell's actions when it denied Pallas' application for the Early Retirement Opportunity ("ERO") further demonstrate that plan eligibility was not based on an immutable neutral number representing years of service. The ERO plan document states that an employee is eligible for an early retirement opportunity if her "unadjusted term of employment is 20 years or more on or before December 31, 1987." In spite of that language, PacBell chose to adjust Pallas' term of employment to exclude her 1972 pregnancy leave but it did not adjust other ERO applicants' terms of employment to exclude their disability leaves from the same period. Moreover, the fact that PacBell re-calculated Pallas' NCS to credit some of her 1972 disability leave is further evidence that the ERO did not simply rely on a "permanent part of the employee's work history." Petition at 8. In *1987*, PacBel made decisions about including or excluding Pallas' 1972 pregnancy-based absence.

It should be noted that Pacific Bell came into existence as a new business entity and employer in or around 1984 when AT&T was divested of its regional operating com-

panies. At that point it established its own pension and benefit policies. *See United States v. American Tel & Tel. Co.*, 552 F. Supp. 131 (D.D.C. 1982), *aff'd.*, 460 U.S. 1001 (1983). When it formed, Pacific Bell drew up criteria for what service would count towards an employee's Net Credited Service date and its pension plans. Pacific Bell then instituted a policy which allowed former employees of its predecessor companies credit for pre-Pacific Bell Service, including periods of leave due to temporary disability, but excluded from that credit all pre-1979 leaves due to pregnancy disability. Pacific Bell was under no obligation to continue the distinction created by Pacific Telephone between pre-1979 pregnancy disability leaves and other pre-1979 temporary disability leaves for purposes of pension benefits.

In fact, the EEOC regulations in effect at the time Pacific Bell established its pension policies in 1984 *required* Pacific Bell to treat pregnancy disability absences the same as other pre-1979 disability absences. The EEOC regulations state in relevant part:

> (b) . . . Written or unwritten employment policies and practices involving matters such as the commencement and duration or leave, the availability of extension, the *accrual* of seniority and other benefits and privileges . . . shall be applied to disability due to pregnancy, childbirth, or related medical conditions on the same terms and conditions as they are applied to other disabilities.
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> * * *
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> (d)(2) Any fringe benefit program *implemented after October 31, 1978* must comply with the provisions of Section 1604.10(b) upon implementation.

29 C.F.R. Section 1604.10 (1990) (emphasis added). Thus when the company was formed, Pacific Bell was legally obligated to credit all temporary disability leaves equally towards its fringe benefit programs.

B. Section 703(h) Only Exempts *Neutral* Seniority Systems From The Reach of Title VII.

PacBell argues that this Court should grant its petition because the Ninth Circuit's decision represents a radical and disruptive departure from this Court's established Title VII analysis of Section 703(h) seniority cases. In reality, the court of appeals followed this Court's line of cases applying 703(h) when it concluded that Section 703(h) was not applicable to this case because PacBell's crediting policies facially discriminated against pregnancy. Moreover, because the seniority system at issue here involves what this Court has defined as a "benefits" seniority system rather than a "competitive status" seniority system, *Franks v. Bowman Transportation Co.*, 424 U.S. 747, 766 (1976), the decision of the court below does not "frustrate the valid reliance interests of other employees regarding such matters as job assignments, work schedules, promotions and layoffs that Congress intended to protect." *See* Petition at 10-11.

Two central holdings emerge from this Court's 703(h) cases. One, neutral seniority systems that treat similarly situated persons the same cannot be challenged under Title VII merely because they have a discriminatory adverse impact, *i.e.*, they are neutral but their use nonetheless has a discriminatory effect. *International Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977); *Lorance v. AT&T Technologies, Inc.*, 490 U.S. 900 (1989); *American Tobacco Co. v. Patterson*, 456 U.S. 63 (1982); *United Air Lines, Inc. v. Evans*, 431 U.S. 553 (1977). Two, facially discriminatory seniority systems can be challenged at any time, regardless of how long they have been in place. *Lorance*, 490 U.S. at ——, 109 S.Ct. at 2269; *Evans*, 431 U.S. at 560.[8]

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[8] Neutral seniority systems can also violate Title VII if they are not bona fide systems. *See* 42 U.S.C. § 2000e-2(h). Whether a seniority system is "bona fide" is a question of fact. *See, e.g., Pullman-Standard, Div. of Pullman, Inc. v. Swint*, 456 U.S. 273, 279-81 (1982). Moreover, under the Civil Rights Act of 1991, sen-

In all of the above Title VII seniority cases, the plaintiffs conceded that their employers' seniority systems were race and gender neutral. Unlike Pallas here, they did not challenge the process and criteria for determining an employee's length of service, or any of the components of the seniority systems. Put simply, they did not challenge the seniority systems themselves. What the plaintiffs in those cases did argue was that, for historical reasons, the *application* of the neutral seniority systems had a negative effect upon the class members.

In *Teamsters*, the defendant's seniority system for purposes of job bidding and layoff protection took into account only the amount of time an employee had been in a bargaining unit. This policy was the same for black, white and Hispanic employees. Plaintiffs conceded that the seniority system was not facially discriminatory. 431 U.S. at 356. Instead, plaintiffs alleged that bargaining unit seniority was discriminatory because it had the effect of locking minority employees into inferior jobs by discouraging transfers to better jobs that had previously been all white.

Evans involved a challenge to United Air Lines' policy of refusing prior service credit to all employees who came back after a break in service. The plaintiff in *Evans* had been forced to resign from United Air Lines because she had married. When she returned to work for United in 1972 she did not receive credit for any prior service. This Court found that the complaint did not state a present violation of Title VII, because the plaintiff had not alleged that the seniority system treated male former employees differently than female former employees. Thus, the seniority system was neutral because it treated similarly situated males and females the same. Pallas' case would be like *Evans* if PacBell's service credit system did

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iority systems which have been adopted for an intentionally discriminatory purpose can be challenged at any time. 102 Pub. L. No. 166, § 112 (1991).

not give service credit for *any* pre-1979 medical disability absences and yet Pallas was challenging the effect of that system.

In *Patterson* and *Lorance*, the plaintiffs also conceded that the seniority systems were neutral, and as in *Teamsters*, they argued that the policies requiring a forfeiture of department seniority upon transferring to another department had the effect of discouraging them from transferring into previously segregated, higher paying departments. Whites and men, respectively, who sought to transfer to other departments also faced the same forfeiture obstacle. Additionally, in *Lorance* some of the plaintiffs also challenged their layoffs as the discriminatory effect of the forfeiture policy which had reduced their seniority.

If the seniority systems described above had been found to discriminate against the plaintiffs under a Title VII adverse impact theory, any remedy would have entailed changing the competitive seniority dates for all the employees in order to eliminate the discriminatory effects. This is the result that the drafters of Section 703(h) intended to preclude and therefore in the cases cited above, this Court concluded that the policies underlying Section 703(h) did not allow adverse impact, *Griggs*-type challenges to neutral seniority systems.

As implied above, another crucial distinction between the above line of Section 703(h) cases and this case is that the instant case does not involve a challenge to a "competitive status" seniority system. Pallas is contesting the way "benefits" seniority is calculated. The seniority at issue here does not determine bidding rights for transfers, promotions, schedules, or order in line for layoffs. In *Franks*, this Court meticulously distinguished between "benefits" seniority like that involved in this case, which does not affect bidding rights, and "competitive status" seniority, which does. "Competitive status" seniority is fundamentally different from "benefits" seniority because

it determines the allocation of scarce resources. 424 U.S. at 766. The implication of the distinction drawn in *Franks* and the other Section 703(h) cases, which all involved competitive seniority systems established by a collective bargaining agreement, is that 703(h) was meant to protect valuable "indefeasibly vested rights conferred by the employment contract." 424 U.S. at 778.[9]

Unlike the dramatic impact of altering a competitive seniority system, if PacBell credits Pallas' 1972 disability leave towards her Net Credited Service date, other employees' entitlement to pension benefits will not be affected in any way. Therefore, this case does not have the sweeping implications for nationwide seniority systems that PacBell would have this Court believe it does and its review by this Court is not necessary or warranted.[10]

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[9] Petitioners cite extensively from *Franks v. Bowman Transportation Co.*, 424 U.S. 747 (1976), in support of their argument that 703(h) was meant to bar claims such as Ms. Pallas'. However, *Franks* did not involve a challenge to a seniority system and its result is not even close to being at odds with that of the court of appeals in this case. The issue in *Franks* was whether Section 703(h) prohibited the award of retroactive seniority to identifiable victims of *hiring* discrimination. This Court concluded that 703(h) allowed for retroactive seniority after a lengthy exploration of the tension between protecting the legitimate, contractual expectations of the innocent workers and Title VII's make-whole remedies for victims of discrimination. It is this discussion which petitioners allude to in their argument that this case involves a challenge to "perpetuation" of the effects of past acts, which is barred by 703(h). *See* Petition at 9.

[10] The plain language of the Pregnancy Discrimination Act provides an additional ground for upholding the decision of the court of appeals. The PDA explicitly limits the special status accorded to bona fide seniority systems under 42 U.S.C. § 2000e-2(h). The Pregnancy Discrimination Act reads, in pertinent part:

> [W]omen affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their

C. The Court of Appeals Correctly Applied This Court's Decision In *Bazemore v. Friday* When It Held That PacBell's Policy of Refusing To Credit Pre-PDA Pregnancy Leaves Was A Current Discriminatory Practice.

In *Bazemore v. Friday*, 478 U.S. 385 (1986), the plaintiffs sued under Title VII to eliminate salary disparities between similarly situated black and white employees. In the same way that PacBell's service crediting policy does not mention pregnancy, the employer's pay policies in *Bazemore* did not explicitly state that whites would be paid more than blacks. Instead, the disparities stemmed from the fact that prior to 1965, the employer's work force was divided into a "white branch" and a "black branch" with black employees being paid less than white employees. 478 U.S. at 394. The two branches were merged in August 1965 and salary adjustments were made, but disparity between the salaries of black and white employees persisted.

Like PacBell here, the court of appeals in *Bazemore* reasoned that defendant's current policies were facially

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ability or inability to work, *and nothing in section 2000e-2(h) of this title shall be interpreted to permit otherwise.* [emphasis added]

The Pregnancy Discrimination Act is unique in specifically limiting the applicability of Section 2000e-2(h), including its seniority provisions. *Compare* 42 U.S.C. § 2000e(k), *with,* 42 U.S.C. § 2000e-2. Congress drafted and enacted the Pregnancy Discrimination Act fourteen years *after* it enacted Section 2000e-2(h), and thus the clear language of the PDA exempts it from the reach of Section 2000e-2(h)'s language "[n]otwithstanding any other provision of this subchapter." "As is true in every case involving the construction of a statute, [the court's] starting point must be the language employed by Congress." *Reiter v. Sonotone Corp.*, 442 U.S. 330, 337 (1979). Here, the language of Section 2000e(k) clearly states that "nothing in section 2000e-2(h) of this title shall be interpreted to permit otherwise." Thus, under the plain language of the Pregnancy Discrimination Act, the "special treatment" accorded bona fide seniority systems is not applicable in the context of a claim of pregnancy discrimination.

neutral, thus it had no duty to eradicate any salary disparities between similarly situated employees that were established before the date that Title VII made those disparities illegal. This Court concluded that the pay scales were not neutral because similarly situated employees were *currently* being treated differently and stated,

> [t]hat the Extension Service discriminated with respect to salaries *prior* to the time it was covered by Title VII does not excuse perpetuating that discrimination *after* the Extension became covered by Title VII . . . . Each week's paycheck that delivers less to a black than to a similarly situated white is a wrong actionable under Title VII, regardless of the fact that this pattern was begun prior to the effective date of Title VII. The Court of Appeals plainly erred in holding that pre-Act discriminatory differences in salaries did not have to be eliminated.

Bazemore v. Friday, 478 U.S. at 395-96 (emphasis in original).

Similarly, PacBell's present system for calculating Net Credited Service is not immunized because it is the continuation of another employer's pre-PDA policies. In *Bazemore*, this Court pointed out that an employment practice "that would have constituted a violation of Title VII, but for the fact that the statute had not yet become effective, became a violation upon Title VII's effective date," and therefore the practice must be corrected. 478 U.S. at 395-96.

Despite PacBell's attempts to limit *Bazemore*'s holding to non-seniority cases, its central holding that a violation of Title VII exists when a policy or practice treats similarly situated persons differently applies equally to service crediting practices which currently treat similarly situated employees differently on the basis of pregnancy. *Bazemore* did not distinguish its conclusions and analysis from that in *United Air Lines, Inc. v. Evans* on the basis

that *Evans* involved a seniority system. 478 U.S. at 396 n. 6. The distinction, as noted by the Ninth Circuit, between the instant case and *Bazemore* on the one hand, and the 703(h) seniority cases cited by PacBell on the other, is that the latter all involved adverse impact challenges to neutral employment practices.

D. The Ninth Circuit's Application of *Bazemore* is Not in Conflict With Decisions of Any Other Circuits.

There is no direct split in the Circuit Courts of Appeal which would warrant grant of certiorari. As the Ninth Circuit stated, "the controlling Supreme Court precedent [in this case] is *Bazemore v. Friday* [citation omitted]." Petition, App. at 6a. There is no split among the Circuits on the issue of *Bazemore*'s applicability to facially discriminatory employment systems.

PacBell's claim of a Circuit split relies entirely on court of appeals decisions decided *before* this Court's opinion in *Bazemore*. *See* Petition at 23-24. The fallacy of relying on pre-*Bazemore* Circuit decisions to argue the existence of a Circuit split is illustrated by the Second Circuit's decisions in *Sobel v. Yeshiva University*, 797 F.2d 1478 (1986), 839 F.2d 18 (2d Cir. 1988), *cert. denied*, 490 U.S. 1105 (1989). After this Court decided *Bazemore*, the Second Circuit remanded *Sobel*, because the trial court "did not have the benefit of the views of the Supreme Court in *Bazemore*, particularly with respect to the significance of pre-act discrimination . . . ." 797 F.2d at 1479 (2d Cir. 1986).

In holding in *Sobel* that the plaintiff had properly stated a claim for relief when she alleged that the current salary disparities were illegal and perpetuated pre-Title VII disparities, the Second Circuit pointed out that, before this Court issued its opinion in *Bazemore*, lower courts had interpreted *Evans* as holding that discrimina-

tory disparities did not have to be corrected if they originated before the PDA applied. *Id.* at 24 (citing, as an example of this reasoning, *Farris v. Board of Education*, 576 F.2d 765, 769 (8th Cir. 1978) [cited in Petition at 24]). *Bazemore*, however, made it clear that such an interpretation of *Evans* was incorrect, because a present employment practice *is* illegal if it continues a pre-PDA discriminatory practice. 478 U.S. at 396 n.6.[11]

Thus, rather than being in conflict, the only two Circuits that have applied *Bazemore*, other than for its holding on the issue of statistical analysis, the Ninth Circuit in the instant case and the Second Circuit in *Sobel*, are

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[11] Thus, the two cases which petitioner cites as "in conflict" with the Ninth Circuit's opinion were based on reasoning explicitly rejected by the Court in *Bazemore*. In *Farris v. Board of Education*, 576 F.2d 765 (8th Cir. 1978), the plaintiff took a pregnancy disability leave at a time when Title VII did not apply to her employer and, as a result, was denied a salary increase that year and remained one step lower on the salary scale in future years. 576 F.2d at 768. The *Farris* court concluded that she could not challenge her lower paychecks, because during the year that she was gone on maternity leave and therefore received a smaller salary increase, Title VII did not apply to her employer. *Id.* at 768. In *Schwabenbauer v. Board of Education*, 777 F.2d 837 (2d Cir. 1985), which relied on the decision in *Farris*, the plaintiff was hired at a time when Title VII did not apply to her employer and state law provided that a teacher must serve a three-year probationary period before a tenure decision was made. *Id.* at 838-39. During her probationary period, she took a maternity leave. *Id.* at 838. When she was denied tenure, she claimed that she had acquired tenure by operation of law because if she had received credit for her maternity leave period, her tenure period ended at a time after which the employer allowed her to continue teaching. *Id.* Rather than examine whether the employer continued the pre-Act discrimination after the Act became applicable to the employer, as it would be required to do under *Bazemore*, the court considered it dispositive that the discriminatory practice occurred before the Act became applicable to the employer. *Id.* at 840-41.

in agreement. Petitioners have not pointed to, and respondent has not found, any post-*Bazemore* court of appeals decisions which conflict with the Ninth Circuit's decision in this case.

III. THE NINTH CIRCUIT DECISION COMPORTS WITH THE SUPREME COURT'S DECISION IN *FIRESTONE* AND DOES NOT CONFLICT WITH ANY DECISIONS UNDER ERISA OF OTHER COURTS OF APPEALS.

Throughout this litigation, Pallas has challenged, under ERISA, the employer's application of the ERO whereby Pallas' pregnancy disability leave taken prior to 1979 was excluded from her eligibility calculations under the pension plan. PacBell, however, casts Pallas' claim as one which challenges the employer's decision to offer particular benefits, here an early retirement option, to qualified, salaried employees. Thus, PacBll, citing *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85 (1983), argues that ERISA does not prohibit discrimination by an employer with regard to its decision to provide or allocate benefits. PacBell argues further that no less than six circuit courts, including the Ninth Circuit Court of Appeals which decided in favor of Pallas, have recognized an employer's right to design, amend, or terminate an ERISA plan without implicating ERISA's fiduciary standards. Petition at 25-26.[12]

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[12] The following cases, all cited by the PacBell, address employer decisions to create, amend or terminate benefit plans; *Fletcher v. Kroger Co.*, 942 F.2d 1137, 1139 (7th Cir. 1991) (employer decision to provide early retirement benefits for employees at specific locations); *Adams v. LTV Steel Mining Co.*, 936 F.2d 368 (8th Cir. 1991) (decision by employer to offer early retirement to specific employees based upon employer's desire to reduce work force); *Belade v. ITT Corporation*, 909 F.2d 736, 737-38 (2d Cir. 1990) (early retirement program offered to employees of "designated departments and units"); *Musto v. American General Corp.*, 861 F.2d 897 (6th Cir. 1988), *cert. den.*, 490 U.S. 1020 (1989) (decision by employer to reduce retiree medical benefits); *Trenton v. Scott*

PacBell's argument misses the mark. Pallas has never taken issue with PacBell's decision to amend its pension plan and offer early retirement to those salaried employees with twenty years or more of service with the employer and/or its predecessor. Pallas, instead, challenges under ERISA the employer's interpretation of the pension plan which expressly predicated eligibility under the ERO upon an employee's "unadjusted term of employment." Pallas challenges PacBell's insistence that eligibility under the ERO depends upon a Net Credited Service date established by the predecessor employer and PacBell's refusal to credit all of her pregnancy disability leave taken in 1972.

PacBell's contention, relegated to a footnote in the Petition, that "there is no issue of improper plan administration" because Pallas' complaint "admits the *plan itself* made all of its benefits dependent upon Net Credited Service" is disingenuous. Petition at 28 n. 13 (emphasis in original). The Plan itself never mentions Net Credited Service, a point observed even by the district court. *See* Petition, App. at 23a. Moreover, Pallas' benefit claim was reviewed by two administrative committees established under the Pension Plan. The review committee making the final determination actually modified Pallas' eligibility date by including part of her pregnancy disability leave. Thus, this case presents precisely the type

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Paper Co., 832 F.2d 806 (3d Cir. 1987), *cert. den.*, 485 U.S. 1022 (1988) (employer offered early retirement to employees at overstaffed plants but not "lean" plants); *Amato v. Western Union Intern., Inc.*, 773 F.2d 1402 (2d Cir. 1985) (employer decision amending plan reducing the number of early retirement options for employees); *Lea v. Republic Airlines, Inc.*, 903 F.2d 624, 631 (9th Cir. 1990) (employer and union free to negotiate the termination of pilots retirement plan without implicating fiduciary responsibilities); *Amalgamated Clothing and Textile Workers Union v. Murdock*, 861 F.2d 1406 (9th Cir. 1988) (decision to terminate pension plan as business decision of employer); *West v. Greyhound Corp.*, 813 F.2d 951 (9th Cir. 1987) (employer's efforts to renegotiate future unaccrued benefits were appropriate in its role as employer and not done as plan administrator). Petition at 25-29.

of benefit determination which the Supreme Court has said must be reviewed under ERISA's fiduciary standards. In *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101 (1989), a decision not mentioned by PacBell, this Court reiterated its admonishment to the lower federal courts to "develop a federal common law of rights and obligations" under ERISA. *Id.* at ——, 109 S.Ct. at 954. This Court held that the denial of benefits challenged under ERISA Section 502(a)(1)(B), 29 U.S.C. § 1132(a)(1)(B), is reviewed under a *de novo* standard unless the plan gives the fiduciary discretionary authority to determine eligibility benefits or construe plan terms, in which case an "abuse of discretion" standard applied. *Id.* at 956.[13]

Pallas seeks precisely what the plan participant in *Firestone* sought: the review of a fiduciary's denial of her benefits claim. The court of appeals found that Pallas had stated a claim by alleging discrimination, based upon pregnancy, in the administration of the pension plan. Ultimately, the district court will have to look to the *Firestone* decision to determine what standard of review applies. PacBell, however, has articulated no reason for the Supreme Court to enter the fray.

The Court of Appeals for the Ninth Circuit recognized that Pallas attacked, under ERISA, PacBell's inter-

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[13] The Court rejected Firestone's argument that Congress's failure to enact a bill establishing the "*de novo*" standard of review for decisions denying benefits was a clear message to the Supreme Court not to adopt such a standard. This Court said, "We do not think that this bit of legislative inaction carries the day for Firestone." *Id.* at ——, 109 S.Ct. at 956. Noting that "failure to act on the proposed bill is not conclusive of Congress' views on the appropriate standard of review," the Court adopted the "*de novo*" standard. *Id.* PacBell's half hearted argument that an amendment to ERISA specifically prohibiting discrimination based upon sex, race or national origin was proposed by Senator Mondale, thereby evidencing Congressional intent to protect fiduciary breaches involving sex discrimination from the reaches of ERISA, should be dispatched with equal ease by the Court.

pretation of, not its adoption of, the pension plan. The court of appeals' decision is consistent with this Court's decision in *Firestone* and certainly does not present the type of direct conflict between the circuits justifying review by the Supreme Court. *See, e.g.*, *Marks v. U.S.*, 430 U.S. 188, 189 n. 1 (1977); *Aldinger v. Howard*, 427 U.S. 1, 3 (1976).

CONCLUSION

For all of the above-stated reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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APPENDICES

APPENDIX A

29 U.S.C. § 1104(a)(1) provides in pertinent part:

(a) Prudent man standard of care

(1) Subject to sections 1103(c) and (d), 1342, and 1344 of this title, a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and—

(A) for the exclusive purpose of:

(i) providing benefits to participants and their beneficiaries; and

(ii) defraying reasonable expenses of administering the plan;

(B) with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims;

(C) by diversifying the investments of the plan so as to minimize the risk of large losses, unless under the circumstances it is clearly prudent not to do so; and

(D) in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of this subchapter and subchapter III of this chapter.

APPENDIX B

29 U.S.C. § 1132(a)(1), (3) provides in pertinent part:

A civil action may be brought—

(1) by a participant or beneficiary—

(A) for the relief provided for in subsection (c) of this section, or

(B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan;

* * *

(3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan;

* * *

APPENDIX C

Section 112 of the Civil Rights Act of 1991, 102 Pub. L. No. 166 (1991), is entitled "Expansion of Right to Challenge Discriminatory Seniority Systems" and provides in pertinent part:

> Section 706(e) of the Civil Rights Act of 1964 (42 U.S.C. 2000e-5(e)) is amended—
>
> (1) by inserting "(1)" before "A charge under this section"; and
>
> (2) by adding at the end the following new paragraph:
>
> "(2) For purposes of this section, an unlawful employment practice occurs, with respect to a seniority system that has been adopted for an intentionally discriminatory purpose in violation of this title (whether or not that discriminatory purpose is apparent on the face of the seniority provision), when the seniority system is adopted, when an individual becomes subject to the seniority system, or when a person aggrieved is injured by the application of the seniority system or provision of the system."